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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

MAR 16 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Rulemaking to Amend Part 1 and )  
Part 21 of the Commission's )  
Rules to Redesignate the 27.5 - )  
29.5 GHz Frequency Band and to )  
Establish Rules and Policies for )  
Local Multipoint Distribution )  
Service )  
 )

CC Docket No. 92-297  
RM-7872, RM-7722  
PP-22

COMMENTS

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## SUMMARY

BellSouth applauds the Commission's efforts to promote this new wireless technology and innovative use of previously unused spectrum. BellSouth supports the Commission's proposal with the modifications discussed in these comments.

BellSouth agrees that all service providers, including local exchange carriers (LECs), should be allowed to elect whether to operate under a local multipoint distribution service (LMDS) license on either a common or non-common carrier basis. However, the Commission should require licensees to submit a description of the proposed services they will offer at the time they make this election to ensure that the election is consistent with how licensees will actually operate in the marketplace. Also, consistent with its policies concerning non-common carrier status, the Commission should treat non-common carrier LMDS services offered by LECs as unregulated service offerings.

BellSouth generally agrees that "non-dominant" status should be afforded to LMDS licensees providing non-video common carrier services. However, BellSouth questions whether the Commission can draw the same conclusion as to an incumbent cable operator which elects to provide common carriage of video programming over a LMDS system. Such conclusion would not be consistent with the Commission's observation that the intent of Congress to facilitate

competition in video distribution services would appear to include a ban on cable ownership of LMDS licenses if used to distribute video programming.

For a variety of reasons, the Commission should not adopt "Basic Trading Areas" (BTAs) for purposes of determining service area boundaries under a LMDS license. The Metropolitan Statistical Areas ("MSAs") and Rural Service Areas ("RSAs") used for licensing cellular and other radio services offer a superior model for determining service areas covered by LMDS licenses.

The use of MSA/RSA service areas will produce the greatest number of opportunities for licensing of small and medium size businesses, facilitate financing, promote diversity in service innovation, and is more conducive to the Commission's proposed build-out requirement. While a three year build-out requirement may be overly ambitious for BTAs, it may be a reasonable requirement for a MSA. However, the Commission should consider a slightly longer build-out period for RSAs due to the less favorable economies of scale associated with construction in larger, less populated rural areas.

The Commission should use auctions for awarding licenses to LMDS providers for many of the same reasons the Commission proposed the use of auctions for awarding PCS licenses. As in the case of PCS, an auction will allow LMDS spectrum to flow promptly and directly to its highest and

best use. The Commission should impose few requirements on bidders for participation in auctions. In general, eligibility requirements should be related to creditworthiness of bidders and the prevention of fraud and bid-rigging. The Commission should not place any restriction on alienation of LMDS licenses, nor should the Commission require a license to be held or facilities to be constructed prior to allowing a license transfer.

Finally, BellSouth urges the Commission to adopt a LMDS license term of ten years. A five year term is simply not sufficient in duration to recover one's investment. A longer license term will facilitate the ability of smaller companies to obtain financing, to participate in the auction process and to meet the Commission's build-out requirements.

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COMMENTS

BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Enterprises, Inc. (collectively "BellSouth") hereby submit their comments in response to the Commission's Notice of Proposed Rulemaking released in the above-captioned docket on January 8, 1993 ("Notice").

In the Notice, the Commission proposes a redesignation of use of the 27.5-29.5 GHz frequency range ("28 GHz band") from point-to-point microwave common carrier service to a new local multipoint distribution service ("LMDS"). The Commission's proposal would allow service providers to use the 28 GHz band, which is virtually unused today, to provide video programming and other communications services. The Commission states that while the most likely use of this spectrum would be to provide video programming, a use that serves the public interest, the Commission will not limit the use of the 28 GHz band only to video service.<sup>1</sup>

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<sup>1</sup> Notice at para. 14.

BellSouth commends the Commission for promoting this new wireless technology and innovative use of previously unused spectrum. Section 7(a) of the Communications Act mandates that the Commission encourage the provision of new technologies and services to the public.<sup>2</sup> The Commission's proposal, with minor modifications discussed below, clearly furthers this goal. The Commission correctly notes that the new technology developed by the Suite 12 Group makes possible the more efficient use of an essentially fallow spectrum band.<sup>3</sup> Enabling the development of this new technology should also further the Commission's public interest goals of promoting competition and diversity of services.

BellSouth limits the remainder of these comments to certain regulatory/licensing issues raised in the Notice.

A. Regulatory Status Of Licensees

The Commission tentatively proposes that LMDS licensees elect whether they will operate as a common or non-common carriers on a channel-by-channel and/or cell-by-cell basis.<sup>4</sup> The Commission invites comment on this tentative conclusion, including the jurisdictional implications of allowing local

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<sup>2</sup> 47 U.S.C. Section 157(a).

<sup>3</sup> Notice at para. 3.

<sup>4</sup> Notice at para. 26.

exchange carriers (LECs) to elect non-common carrier status as to the proposed service.<sup>5</sup>

Given the embryonic stage in the development of this new technology, BellSouth supports the Commission's decision not to prejudge the regulatory status of services that have yet to be shaped by marketplace forces. However, once a LMDS service provider offers services to the public, it is the functional characteristics of those services and the manner by which they are offered that determines whether those services are common or non-common carrier services for regulatory purposes. A service provider's decision to "choose" or "elect" common or non-common carrier status is irrelevant unless the service provider actually operates in a manner consistent with that choice.

To put it in the words of U.S. Court of Appeals for the D.C. Circuit:

A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. (cite omitted)<sup>6</sup>

According to the courts, a non-common carrier is one whose practice is to make individualized decisions, in particular cases, whether and on what terms to deal, and who is under no legal compulsion to offer the service

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<sup>5</sup> Id.

<sup>6</sup> See, National Association Of Regulatory Utility Commissioners v. FCC ("NARUC I"), 525 F.2d 630, 644 (1976), cert. denied, 425 U.S. 992 (1976).

indifferently.<sup>7</sup> A common carrier is one who holds itself out indifferently to serve those who find the carrier's service to be of use, or is under a legal compulsion to do so.<sup>8</sup> Additionally, in the communications field, the common carrier's service must be such that customers "transmit intelligence of their own design and choosing."<sup>9</sup>

BellSouth supports the position that all service providers, including LECs, should be allowed to elect whether to operate on a common or non-common carrier basis as to the services provided under a LMDS license. As pointed out in the Notice, it is well established law that a particular service provider can simultaneously be both a common carrier as to some services and a non-common carrier as to others.<sup>10</sup> However, the Commission should clarify that this election does not entitle a service provider to avoid common carrier status and its associated regulatory obligations simply by claiming that its status is non-common carrier.

At the time the LMDS licensee elects either common carrier or non-common carrier service status, the licensee should be required to set forth a description of the

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<sup>7</sup> Id., at 641.

<sup>8</sup> Id., at 641-42.

<sup>9</sup> NARUC v. FCC ("NARUC II"), 533 F.2d 601, 609 (1976).

<sup>10</sup> Notice at para. 26; accord, World Communications Inc. v. FCC, 735 F.2d 1465, 1471, 1474 (D.C. Cir., 1984); and NARUC II, supra, at 608.

functional characteristics of the planned services and how the service provider intends to offer those services. The Commission can then use this information to verify that the election is consistent with how the service provider actually plans to operate, rather than simply relying upon what the service provider claims to be. Failure to maintain consistency between the regulatory status of LMDS licensees and how they actually operate will introduce competitive distortions in the marketplace and undermine the Commission's goals.

Consistent with the Commission's policies concerning non-common carrier status, the Commission should treat the election by a LEC to provide a non-common carrier LMDS service as an unregulated service offering. Since LMDS technology presumably will not be an integral part of the LEC's traditional common carrier transport facilities, the provision of a non-common carrier service by a LEC should not be subject to any additional regulation, other than the removal of the related costs of such activities from the LEC's common carrier activities pursuant to the Commission's Joint Cost Order.<sup>11</sup>

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<sup>11</sup> See, Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, CC Docket No. 88-111, 2 FCC Rcd 1298 (1987), as amended (subsequent history omitted).

B. Classification Of LMDS Common Carriers As "Non-Dominant" Carriers

The Commission tentatively proposes to treat LMDS operators electing common carrier status for part or all of their systems as "non-dominant" carriers, subject to streamlined tariff regulation as with MMDS.<sup>12</sup> BellSouth concurs in the Commission's conclusion that telecommunications services are so well represented in the marketplace that no LMDS operator will have a monopoly or near monopoly position regarding those services. Therefore, "non-dominant" status should be afforded to LMDS licensees providing non-video common carrier services since they will have insufficient market power to engage in anticompetitive pricing.

BellSouth questions whether the Commission can draw the same conclusion as to an incumbent cable operator providing common carriage of video programming over a LMDS system, should cable operators be allowed to obtain a LMDS license in their cable franchise service area. In the Notice, the Commission observes that the recently-adopted Cable TV Consumer Protection and Competition Act of 1992,<sup>13</sup> generally prohibits cable operators from holding a license for MMDS in their own cable franchise areas.<sup>14</sup> The Commission goes on

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<sup>12</sup> Notice at para. 27.

<sup>13</sup> P.L. 102-385, Section 11, 47 U.S.C. Section 533(a).

<sup>14</sup> Notice at para. 34.

to note the similarities between LMDS and MMDS, and that the intent of Congress to facilitate competition in video distribution services would appear to include a ban on cable ownership of LMDS licenses if used to distribute video programming.<sup>15</sup> This being the case, any common carrier transport of video programming by a LMDS licensed cable operator in its cable franchise area, if permitted, should be regulated as a dominant common carrier service. Any other result would be inconsistent with the above-referenced expression of Congressional intent and the Commission's goals of promoting video programming competition.

C. Service Areas

The Commission tentatively proposes to license LMDS by the 487 "Basic Trading Areas" (BTAs) identified in the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123d Edition, pp. 36-39, plus Alaska and Puerto Rico, for a total of 489 regional licenses encompassing all land areas within the United States.<sup>16</sup>

The Metropolitan Statistical Areas ("MSAs") and Rural Services Areas ("RSAs") used for licensing cellular and other radio services are the best model for geographic area licensing and clearly preferable to the other alternatives suggested by the Commission. The MSA/RSA definitions used and developed for area-wide radio licensing are well

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<sup>15</sup> Id.

<sup>16</sup> Notice at para. 30.

understood by the FCC, the communications industry, and the financial community. The Commission has used MSAs and RSAs not only for cellular licensing, but also for area-wide licensing of interactive television service.<sup>17</sup> Since it is expected that LMDS will, at least initially, be used principally for distribution of video programming, the rationale supporting the use of MSAs/RSAs for licensing of interactive television service is equally applicable to LMDS. In short, there are similar communities of interest which parallel the essentially local nature of today's video programming market that is currently dominated by local cable television systems.

The use of smaller service areas than recommended by the Commission will produce the greatest number of opportunities for licensing of small and medium size businesses, including minority owned businesses.

The MSA/RSA approach tends to minimize transaction costs associated with having larger areas. Moreover, as the Commission recognized in its Notice of Proposed Rulemaking concerning personal communication services (PCS) licenses, smaller service areas foster broader participation that may produce a greater diversity and degree of technical and

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<sup>17</sup> Interactive Video and Data Service, 7 FCC Rcd 1630, recon. in part, 7 FCC Rcd 4923 (1992), pet. for recon. pending.

service innovation than would be expected from a few large firms.<sup>18</sup>

As with PCS, the cost involved in acquiring, constructing, and operating a widespread LMDS network will be directly related to the size of the licensed service area. The capital requirements for large service areas may exclude smaller firms from participation, due to their lack of access to the capital markets. Smaller and minority firms should be better able to obtain financing for an MSA or RSA system. Far fewer firms would be able to finance a system covering the larger areas the Commission is considering. Also financial institutions may be more hesitant to fund LMDS projects encompassing larger BTA areas than projects scaled to the size of an MSA or RSA.

The Commission is wrong to assume that the use of larger licensing areas will necessarily speed deployment and delivery of service. The greatest delays in cellular processing resulted not from the use of MSAs and RSAs, but from the initial use of comparative hearings and from the rulemaking process that eventually resulted in adoption of the RSA concept.<sup>19</sup> Indeed, the use of a new geographic model for licensing purposes is more likely to introduce

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<sup>18</sup> Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd. 5676 (1992), at 5700.

<sup>19</sup> As noted in Section E of these Comments, these delays and administrative inefficiencies can be avoided by using an auction approach to awarding the LMDS licenses.

delays than one that is already time-tested and well understood by the industry and the Commission. Furthermore, the use of smaller MSAs/RSAs for licensing purposes is much more conducive to the Commission's proposal to impose a relatively short build-out requirement upon licensees.<sup>20</sup>

D. Service Of Minimum Areas And/Or Populations

To ensure LMDS licensees use the radio spectrum efficiently and provide service to the public, the Commission tentatively proposes that within three years of being granted a license, a licensee shall be capable of providing LMDS service to at least ninety percent of the population residing within the relevant service area.<sup>21</sup> Likewise, to ensure the public receives expeditious service, the Commission proposes to require that licenses be conditioned on constructing the LMDS system within three years of the date of license grant.<sup>22</sup>

BellSouth supports the Commission's use of a "build-out" requirement to ensure the efficient use of spectrum and the expeditious delivery of service to the public. However, any build-out requirement which the Commission ultimately adopts should be commensurate with the size and population density characteristics of the service areas covered by the LMDS license. While a three year build-out requirement may

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<sup>20</sup> See, Section D of these Comments, infra.

<sup>21</sup> Notice at para. 32.

<sup>22</sup> Notice at para. 48.

be overly ambitious for the Basic Trading Areas (BTAs) tentatively proposed by the Commission, it may be a reasonable requirement for a MSA. On the other hand, the Commission may want to consider a slightly longer build-out period for RSAs due to the less favorable economies of scale associated with construction in larger, less populated rural areas.

E. Selection From Among Mutually Exclusive Applicants

The Commission tentatively proposes to use random selection, or competitive bidding, if enabling legislation is provided by Congress to choose among any mutually exclusive LMDS applications.<sup>23</sup>

BellSouth supports the use of auctions for awarding licenses to LMDS providers. The reasons supporting this position are similar to those supporting the Commission's proposal to use auctions for awarding licenses for PCS, a proposal which BellSouth strongly endorses.<sup>24</sup>

Administrative processes such as comparative hearings and lotteries lead to far less desirable results from an economic perspective than auctions. The auction prices will drive service applications towards their highest and best use in the marketplace, thereby benefiting the general

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<sup>23</sup> Notice at para. 36.

<sup>24</sup> See, PCS Comments of BellSouth, filed November 9, 1992, Gen. Docket No. 90-314, ET Docket No. 92-100, PP-35-40, PP-79-85, at 55-62.

public and furthering the Commission's goals of promoting the most efficient use of scarce spectrum.

As with PCS licenses, the Commission should impose few requirements on bidders for participation in auctions. In general, eligibility requirements should be related to creditworthiness of bidders and the prevention of fraud and bid-rigging.

The winner of the auction should be required to pay a specified percentage of the winning bid, either immediately after the auction or within a specified time. This should be a non-refundable payment in order to ensure bona fide bidders and to discourage speculators. Auction expenses should be deducted from this payment. Nonpayment of this sum or the entire bid amount when due should result in the license being reaucted as soon as possible.

After the auction, the winning bidder, or the bidder's assignee, should have a specified period (e.g., 30 days) within which to file an application for a LMDS license that demonstrates its technical and financial qualifications to meet the Commission's build-out requirements for the license. The application should describe the system to be built, the technology to be employed, and contain a sufficient description of services and how they will be offered to verify the bidder's election to provide either common or non-common carrier services. The applicant should be required to demonstrate its technical and financial

qualifications for carrying out its proposal, as well as its ability to reasonably obtain any regulatory approvals or certifications that may be necessary to provide the particular LMDS services it proposes to offer in the licensed area in question.

BellSouth recommends that the Commission not place any restriction on alienation of licenses. Specifically, the Commission should not, as proposed in the Notice, bar licensees from transferring a LMDS license until after the LMDS system has been constructed and is serving the public.<sup>25</sup>

On the other hand, any transfer of a LMDS license should not toll or extend the original build-out period. Also, an assignment or transfer application should be filed to permit review of any proposed new owner's qualifications, and grant of the application should be a prerequisite to closing on the transaction. However, there should be no "holding period", no requirement to construct before transfer, and no limitation on the eligibility of transferee based on transferee status. Additionally, such restrictions interfere with market forces and prevent the spectrum from moving promptly to its highest and best use. Such restrictions undermine the regulatory goals of this proceeding to provide licensees sufficient flexibility to

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<sup>25</sup> Notice at para. 39.

satisfy consumer demand and to ensure the most efficient use of the spectrum.

F. License Term

The Commission tentatively proposes a five year license term, but requests comments on whether a license term of ten years would be more appropriate for this service.<sup>26</sup>

BellSouth urges the Commission to adopt a license term of ten years. Based upon BellSouth's experience with cellular operations, a license term of five years is simply not sufficient in duration to develop the underlying infrastructure to meet demand for a new, robust service or recover one's investment. A ten year term is much more reasonable. A longer license term will also facilitate the ability of smaller companies to obtain the necessary financing to participate in the auction process and to meet the build-out requirements ultimately adopted by the Commission.

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<sup>26</sup> Notice at para. 40.

CONCLUSION

For the foregoing reasons, BellSouth submits that the public interest would be served by adoption of the Commission's proposal as modified in these comments.

Respectfully submitted,

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